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NOV 2 1 2006
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SUPREME COURT, U.S.

No. 05-584

In The
Supreme Court of the United States

POWEREX CORP., a Canadian Corporation,
dba POWEREX ENERGY CORP.,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. BILL LOCKYER, Attorney General of the State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THERE IS NO REASON TO HOLD THE PETITION IN ABEYANCE IN LIGHT OF THIS COURT'S HOLDING IN *KIRCHER*

This brief is submitted in response to the brief filed by the United States as Amicus Curiae. As the United States' brief confirms, there is no reason to grant the certiorari petition in No. 05-584. There is also no reason for holding the petition in abeyance pending resolution of the certiorari petition in No. 05-85, because whatever the outcome in No. 05-85, the dismissal of the appeal in No. 05-584 was compelled by 28 U.S.C. § 1447(d).

1. Whereas in No. 05-85 the court of appeals concluded that it had appellate jurisdiction, the court in this case properly concluded that it did not have appellate jurisdiction and properly dismissed the appeal. The court here dismissed the appeal in clear and straightforward language. Citing 28 U.S.C. § 1447(d) and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995), the court "dismiss[ed] [the] appeal for lack of jurisdiction." Pet. App. 1a; see also Pet. App. 2a (stating in the order to show cause that "this court may lack jurisdiction over the appeal because an order remanding a removed action to state court for lack of subject matter jurisdiction is not reviewable on appeal"). Although petitioner argues that the panel in this matter felt compelled to dismiss the appeal by virtue of another panel's earlier holding in No.

05-85,[1] that is not what the court said in its dismissal order.

Moreover, the argument is beside the point. Whether or not the panel decision at issue in No. 05-85 was binding on the panel whose decision is at issue in this petition, dismissal of the appeal here was mandated by § 1447(d) because the district court remanded the action to state court on the ground that "federal removal jurisdiction is lacking." Pet. App. 15a. In particular, the district court determined that petitioner does not qualify as a "foreign state" under the FSIA, thereby making a threshold determination of the court's subject matter jurisdiction. Pet. App. 14a; see also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (stating that the FSIA provides "the sole basis for obtaining jurisdiction over a foreign state"). As this Court has made clear, "[i]f a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction' [under § 1447(c)], his order is not subject to challenge in the court of appeals." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976), quoted in *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006).

2. Accordingly, even were this Court in No. 05-85 to determine that the action there had been properly removed, that determination would not perforce call into question the propriety of the dismissal of the appeal in this matter. The district court here remanded for lack of jurisdiction, a ground specified in § 1447(c). Pet. App. 14a-15a. As the

[1] Thus the United States observes that there is "some dispute" between the parties as to the basis for the court's dismissal. Brief for the United States at 19.

Court has "relentlessly" reminded the lower courts, "'[w]here the order is based on one of the [grounds enumerated in 28 U.S.C. § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand.'" *Kircher*, 126 S. Ct. at 2153, 2154 (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14 n. 13 (1977)) (changes in original).

3. There is no other sound reason for holding the petition here in abeyance. Unlike BC Hydro in No. 05-85, petitioner here makes no claim of immunity from state-court jurisdiction under 28 U.S.C. § 1604; thus, the remand order here should not be reviewable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Cf. *Osborn v. Haley*, No. 05-593, Brief for Respondent Barry Haley at 13.

The United States seems to suggest that the "collateral order doctrine" could extend to petitioner's appeal here on the theory that Congress intended to afford foreign states a federal forum and a trial without a jury. Brief for the United States at 20 n. 13. However, consistent with Congress's intent, petitioner *was* afforded a federal forum for the determination of its foreign-state status. Moreover, as noted above, petitioner makes no claim of immunity from suit such as informs the underlying rationale of the collateral order doctrine, and Congress has expressly declined to immunize foreign states from state-court jurisdiction in the circumstances presented in this case. 28 U.S.C. § 1605(a)(2). Furthermore, petitioner has never contended that it would be subject to a jury trial in proceedings under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq., or under the California Commodity Law, Cal. Corp. Code § 29500 et

seq., and respondent has not sought a jury trial in the state court proceedings.[1]

The United States' suggestion would distort the straightforward directive of § 1447(d) by engrafting onto a motion to dismiss an appeal under § 1447(d) a procedure for determining whether, under the state laws that govern the particular state-court action at issue, the defendant/appellant might irremediably be subject to a jury trial by virtue of an erroneous remand. Such case-by-case collateral analysis of state procedure by the appellate courts would only "'prolong[] litigation of questions of jurisdiction of the district court,'" *Kircher*, 126 S. Ct. at 2152 (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)), beyond that contemplated by the plain language of § 1447(d), in frustration of congressional intent to avoid delay of litigation on the merits by the state court – "an equally competent body," *id.* at 2156 (citing *Missouri Pacific R. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896)).

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[1] Moreover, as respondent has noted earlier, petitioner successfully obtained dismissal of respondent's state court action, see Brief for Respondent in Opposition at 7, and that dismissal is presently on appeal. If petitioner were to prevail on appeal before decision in No. 05-85, the instant petition will be rendered moot. But even if respondent were to prevail on appeal and the state court proceedings were returned to the trial court, if petitioner prevails in No. 05-85, petitioner can renew its claim of foreign state status in state court, see *Kircher*, 126 S. Ct. at 2157, to ensure that it suffers no procedural prejudice by virtue having to litigate in state court rather than federal court.

CONCLUSION

For the reasons stated herein and in respondent's earlier brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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